

PUBLIC UTILITIES COMMISSION

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TO PARTIES OF RECORD IN CASE 15-02-021:

This is the proposed decision of Administrative Law Judge Anthony Colbert. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's September 15, 2016 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ STEVEN KOTZ for
Karen V. Clopton, Chief
Administrative Law Judge

KVC:ek4
Attachment

Decision **PROPOSED DECISION OF ALJ COLBERT** (Mailed on 8/12/2016)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Ramin Hatam,

Complainant,

vs.

San Diego Gas & Electric Company,
(U902E),

Defendant.

Case 15-02-021
(Filed February 24, 2015)

DECISION DISMISSING THE COMPLAINT OF RAMIN HATAM

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DECISION DISMISSING THE COMPLAINT OF RAMIN HATAM**Summary**

This Decision denies the relief requested and dismisses the complaint filed by Ramin Hatam against San Diego Gas & Electric Company (U902E).

This proceeding is closed.

1. Parties

Ramin Hatam (Mr. Hatam or Complainant) owns and resided from 2010 to 2014 at 5001 Pacific Drive in San Diego, California (the Property). Complainant is a customer of San Diego Gas & Electric Company (SDG&E or Defendant).

Defendant is a provider of electricity and natural gas service and is an investor-owned public utility under the jurisdiction of the California Public Utilities Commission (Commission).

2. Factual and Procedural Background

In January of 2010, Ramin Hatam moved to the Property with his wife and daughter.¹ Several years prior, between 2005 and 2007, the City of San Diego (City) established an Underground Utility District and conducted a program to place overhead electric distribution lines in the District underground. The undergrounding program excluded two poles adjacent to the Property, one located in a private easement and one located in a City right-of-way.² The City approved the boundaries of the Underground Utility District and authorized the

¹ Prehearing Conference Reporter's Transcript, page 8: line 6.

² SDG&E Post-Prehearing Conference Reply Brief at 2-4.

program. SDG&E designed and engineered the conversion of the overhead facilities to underground facilities.³

Mr. Hatam asserts that he and his family experienced various medical conditions while residing at the Property. At his request, during the summer of 2014, SDG&E personnel visited the Property and took measurements of electric and magnetic field (EMF) radiation levels at various locations around Complainant's home.⁴ In September of 2014, Mr. Hatam filed an informal complaint (#329614) with the Commission.⁵ Complainant moved from the Property in October of 2014.⁶

Mr. Hatam filed the instant formal Complaint (C.) 15-02-021 with the Commission on February 24, 2015, claiming that SDG&E "forgot" to upgrade the two poles at the Property during the undergrounding project ten years prior. He alleged that this had caused the EMF levels at the property to rise "considerably" and led to medical problems for him and his family.⁷ Mr. Hatam requested that the Commission compel SDG&E to remove the two poles and associated wires adjacent to the Property. SDG&E filed its Answer to the Complaint on April 10, 2015, and simultaneously filed a Motion for Summary Dismissal. Complainant filed a response on April 17, 2015.

The assigned Administrative Law Judge (ALJ) W. Anthony Colbert held a prehearing conference (PHC) for this proceeding on June 1, 2015. SDG&E filed a

³ *Id.* at 4.

⁴ Complaint at 2, Attachment titled "EMF Measurement Data."

⁵ SDG&E Post-Prehearing Conference Reply Brief at 8 (Footnote 17).

⁶ Hatam Post-Prehearing Conference Brief, Attachment 2.

⁷ Complaint at 2.

Post-Prehearing Conference Brief on June 19, 2015, and Complainant filed a similar document on June 25, 2015.⁸ SDG&E filed a Reply Brief on June 26, 2015.

Concurrent with initiating this proceeding at the Commission, Mr. Hatam also filed suit against the City of San Diego in San Diego Superior Court, alleging general negligence on the part of the City in failing to upgrade the two poles adjacent to the Property, and seeking damages for property damage and medical expenses that he attributed to increased EMF levels.⁹ The City demurred. On June 19, 2015, the Superior Court dismissed the complaint without leave to amend, on the grounds that the Commission preempted its subject matter jurisdiction over the case. The Superior Court did not address the merits of Mr. Hatam's complaint.¹⁰

On February 11, 2016, the Commission issued an Order Extending Statutory Deadline, extending the deadline for resolution of this proceeding to August 24, 2016.

3. Standard for Summary Dismissal

SDG&E has moved to summarily dismiss the Complaint. The standard for ruling on a motion for summary dismissal is whether, taking the well-pleaded factual allegations of the complaint as true, the moving party is entitled to judgment as a matter of law.¹¹

⁸ Complainant's April 16, 2015 and June 25, 2015 filings were both titled "Answer Complainant Ramin Hatam." For clarity, we refer to the April 16 filing as "Hatam Response to SDG&E's Answer," and the June 25 filing as "Hatam Post-Prehearing Conference Brief."

⁹ SDG&E Post-Prehearing Conference Reply Brief, Attachment C.

¹⁰ *Id.* at 5-6, Attachment B.

¹¹ See e.g., *Re Western Gas Resources-California, Inc.* (1999) D.99-11-023 at 7.

In evaluating the sufficiency of a complaint's allegations, the Commission is guided by Public Utilities Code (Pub. Util. Code) Section 1702, which provides that a complainant must: (a) allege that a regulated utility has engaged in an act or failed to perform an act; and (b) in violation of any law or commission order or rule.¹² This means that complainants must allege specific facts that point to an action or inaction that violates existing law.

With this standard in mind, we will examine the parties' assertions and arguments to determine whether the issues raised in the Complaint state a cause of action under any law or Commission order or rule. If not, the case can be summarily dismissed.

4. Parties' Positions

Complainant has alleged two primary violations of law and regulation in his complaint. First, Complainant asserts that SDG&E violated its easement because it "forgot" to place the two poles adjacent to the Property underground and allowing the EMF emissions to increase,¹³ and by moving the poles during the underground conversion in a way that placed the attached distribution line outside the border of the easement.¹⁴ Second, Complainant asserts that the configuration of the poles and distribution lines violates clearance requirements set forth in the National Electrical Safety Code (NESC)¹⁵ and the Commission's General Order 95.¹⁶ In addition, Complainant has suggested that SDG&E

¹² Cal. Pub. Util. Code. § 1702.

¹³ Complaint at 2-3.

¹⁴ Hatam Response to SDG&E Answer at 2.

¹⁵ Complaint at 3.

¹⁶ Hatam Response to SDG&E Answer at 1.

violated its Tariff Rule 20A during the 2005-2007 undergrounding project by failing to include the two adjacent poles.¹⁷

SDG&E primarily contends that it is entitled to summary dismissal because the alleged EMF emissions do not constitute a violation of Commission regulation, which is the sole source of authority on the issue. SDG&E points to *San Diego Gas & Electric Company v. Superior Court (ex rel. Covalt)* (1996) 13 Cal. 4th 893, where the California Supreme Court affirmed that the Commission has the authority to determine whether EMF emissions resulting from power lines constitute a health risk, and what action, if any, regulated utilities should take to mitigate that risk.¹⁸ SDG&E states that the Commission's policy on EMF adopted in Decision (D.) 06-01-042 directed utilities to use no-cost and low cost mitigation measures for new transmission and substation projects, but specifically declined to consider requiring similar measures for distribution facilities. SDG&E argues that Complainant's allegations of EMF arising from residential distribution design or operation are therefore insufficient to state a violation of Commission regulation, and must fail as a matter of law.

SDG&E asserts that Complainant's other allegation, which is that its facilities violate NESC or General Order 95 clearance requirements relative to the perimeter of Complainant's home, must also fail. SDG&E explains that NESC is a voluntary standard that has not been adopted as law in California, and that safety clearances for its facilities are instead regulated by the Commission's

¹⁷ See SDG&E Post-Prehearing Conference Brief at 7-8 (interpreting Complainant's brief as alleging a Rule 20A violation).

¹⁸ *Ex rel. Covalt*, 13 Cal. 4th at 923.

General Order 95.¹⁹ As ordered by the assigned ALJ, SDG&E undertook a survey of the equipment at the Property while Complainant was present. SDG&E's surveyor declared in an affidavit that the facilities conform to General Order 95 clearance requirements.²⁰

SDG&E concedes that its wires extend past the boundary of the easement,²¹ but asserts that since its facilities do not violate General Order 95, any alleged easement violation is a pure property dispute that falls outside the Commission's jurisdiction. SDG&E cites to *Koponen v. Pacific Gas and Electric* (2012) 165 Cal. App. 4th 345, in which the court held that the Commission "has no regulatory authority or interest in private disputes over property rights between PG&E and private landowners."²² The court in *Koponen* found that the Commission lacked authority to resolve a dispute over whether (Pacific Gas & Electric Company (PG&E) had exceeded the scope of its easement by leasing or licensing its facilities to third-party telecommunication providers, since the dispute was not about the regulation of PG&E's use of PG&E property, but about whether PG&E had invaded the private plaintiff's property rights. Here, SDG&E argues that Complainant's allegation that SDG&E has exceeded the scope of its easement, independent of a violation of Commission regulation, constitutes a private property dispute similar to *Koponen* over which the Commission lacks jurisdiction.

¹⁹ SDG&E Motion for Summary Dismissal at 6.

²⁰ SDG&E Post-Prehearing Conference Brief, Affidavit of William L. Belt, page 2: line 5- line 7.

²¹ SDG&E Post-Prehearing Conference Brief at 10.

²² *Koponen*, 165 Cal. App. 4th at 353.

SDG&E also argues that insofar as Complainant alleges a violation of SDG&E Tariff Rule 20A, this claim logically fails because SDG&E was not authorized by Rule 20A to place the facilities in question underground. SDG&E points out that pursuant to Tariff Rule 20A, the City of San Diego was responsible for selecting which facilities to convert from overhead to underground during its 2005-2007 conversion, and that Complainant's own exhibit shows that the City excluded the poles in the private easement adjacent to Complainant's property from the underground utility district.²³ SDG&E argues that the Complainant cannot be entitled to relief based on an action that SDG&E was not authorized to pursue.²⁴

Finally, SDG&E argues that equitable factors should weigh in favor of the Commission dismissing the Complaint. SDG&E argues that the Complainant "came to the nuisance," because the poles and distribution lines at issue in this proceeding were clearly visible when he purchased the house in 2010. SDG&E also argues that the Complainant committed laches because he did not file a complaint until 2014.

5. Discussion

Taking the entirety of the factual assertions stated by Mr. Hatam in this proceeding to be true, we find that Complainant has failed to state a claim upon which this Commission may grant relief.

Complainant's primary assertion that SDG&E's overhead distribution equipment caused EMF levels on the Property to rise does not constitute a cause of action under law or Commission regulation. The Commission has exclusive

²³ SDG&E Post-Prehearing Conference Reply Brief at 4.

²⁴ SDG&E Post-Prehearing Conference Brief at 7-8.

jurisdiction over issues related to EMF exposure from the facilities of investor-owned utilities, as confirmed by the California Supreme Court in *Covalt*.²⁵ In D.06-12-042, the Commission updated its policy on mitigating EMF exposure and directed utilities to implement low-cost/no-cost EMF mitigation measures in the design of new and upgraded transmission line and substation projects.²⁶ In the Scoping Memo for that proceeding, the Commission specifically declined to include the consideration of distribution lines as an issue.²⁷ Here, SDG&E is neither upgrading nor installing new equipment, nor is the power line adjacent to the Property associated with transmission or a substation. Even assuming the distribution line caused an increase in EMF levels at Mr. Hatam's property, this does not constitute a violation of D.06-12-042, or any other Commission rule or order, which is the exclusive source of authority on this issue.

Similarly, Complainant has failed to show that any action or inaction by SDG&E relative to the City's undergrounding program constituted a violation of law or Commission rule. SDG&E's Tariff Rule 20A provides that the City, not SDG&E, has the responsibility to establish the boundaries of an underground utility district. Complainant alleges that SDG&E "forgot" to underground the two poles at issue in this proceeding, but does not dispute that the City in fact excluded the poles from the undergrounding district. As discussed above, no Commission regulation requires SDG&E to mitigate EMF in the design of converting overhead distribution lines to underground. Nothing in the facts

²⁵ See also Order Instituting Rulemaking (R.) 04-08-020 at 6-7 (explaining that *Covalt* acknowledges the Commission's exclusive jurisdiction over issues related to EMF exposure as it determines the public health threats arising from public utility equipment).

²⁶ D.06-12-042 at 22, Ordering Paragraph #2.

²⁷ *Id.* at 4.

alleged by Complainant therefore show that SDG&E's conduct during the underground conversion project over a decade ago constitutes a cause of action today.

Complainant's allegations that SDG&E's poles and lines violate applicable safety clearance requirements also fail as a matter of law. We take as true the June 15, 2015 survey map²⁸ ordered by the Assigned ALJ. The survey was conducted, by TCAC Engineering²⁹ in the Complainant's presence and the survey's results have not been disputed. SDG&E has provided the Affidavit of William L. Belt, Project Management Supervisor for SDG&E, whose duties include confirming GO 95 compliance for distribution facilities and who has personally inspected the facilities that are the subject of the complaint.³⁰ Mr. Belt's affidavit confirms that (1) the facilities conform to GO 95 in all regards,(2) there are no underground facilities in the easement that is the subject of the complaint, and (3) Exhibit A to his affidavit shows that the pole in the easement is 33.5 feet from the nearest point on complainant's home, and the pole in the city franchise is 22.9 feet from the nearest point on complainant's home,³¹ General Order 95 is the applicable authority for safety clearances for regulated utilities under the Commission's jurisdiction. California has not adopted the National Electrical Safety Code (NESC) and it is not relevant to this proceeding.

²⁸ See Exhibit A to Attachment 1 (Affidavit of William L. Belt) to SDG&E Post-Prehearing Conference Brief.

²⁹ *Id.*

³⁰ SDG&E Post-Prehearing Conference Brief at 5.

³¹ Affidavit of William L. Belt, Attachment 1 to SDG&E Post-Prehearing Conference Brief.

Finally, in the absence of a violation of Commission regulation, the Commission lacks jurisdiction to resolve any remaining easement issue. Whether Complainant has a cause of action arising from the portions of SDG&E's distribution line that fall outside the borders of its private easement is a "private dispute over property rights" like the dispute over the right to sell or lease a private right-of-way in *Koponen*. We do not have the authority to adjudicate this dispute and therefore it does not affect our disposition of this complaint.

Because this complaint fails as a matter of law, it is not necessary for us to address in this decision SDG&E's arguments regarding equitable factors that weigh in favor of dismissal, such as whether the Complainant "came to the nuisance" or committed laches by waiting four years to submit a complaint.

6. Conclusion

The Complainant has failed to demonstrate that the Defendant has engaged in any activity or inactivity that violates law or Commission rule or order. There is no disputed or triable issue of material fact before and/or under the Commission's jurisdiction in this proceeding. The Complainant's request for relief is denied and the case is dismissed. This proceeding is closed.

7. Categorization and Need for Hearing

The categorization of this proceeding remains adjudicatory and the hearing determination is changed to no hearings necessary.

8. Comments

The proposed decision of ALJ Colbert in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and

Procedure. Comments were filed on _____ and reply comments were filed on _____.

9. Assignment of Proceeding

Liane M. Randolph is the assigned Commissioner and W. Anthony Colbert is the assigned ALJ and Presiding Officer in this proceeding.

Findings of Fact

1. Complainant owns and resided from 2010 to 2014 at 5001 Pacific Drive, San Diego, California (the Property). Complainant moved from the Property in October of 2014.
2. Defendant is a provider of electricity and natural gas service and is an investor-owned public utility under the jurisdiction of the Commission.
3. Complainant is a customer of SDG&E.
4. In fall of 2014, SDG&E dispatched staff at Complainant's request to measure electric and magnetic field levels at Complainant's property.
5. Between 2005 and 2007, City of San Diego established an Underground Utility District and conducted a program to place overhead distribution lines underground.
6. The City exempted two poles adjacent to the Complainant's property from the Underground Utility District.
7. SDG&E engineered the conversion of the facilities specified in the City's Underground Utility District from overhead to underground.
8. There are two poles adjacent to the Complainant's property.
9. One of the poles adjacent to Complainant's property is located in a private easement and the other is located in a City right-of-way.
10. SDG&E requests that the Commission dismiss this case as a matter of law.

11. There is no disputed or triable issue of material fact within the Commission's jurisdiction in this proceeding.

Conclusions of Law

1. The Complainant has failed to state a claim upon which the Commission can grant relief.

2. Commission policy does not currently require SDG&E to undertake EMF mitigation activities for pre-existing distribution equipment, or in the conversion of overhead distribution facilities to underground.

3. SDG&E Tariff Rule 20A provides for the City of San Diego to select which facilities to include in an underground conversion project, and provides for SDG&E to engineer the design of those facilities to underground.

4. SDG&E's electrical equipment and poles adjacent to the Property conform to the safety clearance requirements in General Order 95.

5. Any remaining dispute regarding the placement of SDG&E's facilities relative to the private easement adjacent to Complainant's property falls outside the Commission's jurisdiction.

6. Evidentiary hearings are not needed.

7. Defendant's Motion for Summary Dismissal should be granted.

8. The Complaint against the Defendant should be dismissed.

O R D E R

IT IS ORDERED that:

1. The Complainant's request for relief is denied.

2. The complaint of Ramin Hatam against San Diego Gas & Electric Company is dismissed.

3. The hearing determination is changed to no hearings necessary.

4. Case 15-02-021 is closed

This order is effective today.

Dated _____, at San Francisco, California.